FILED
FEB 8 1999
CLERK

No. 98-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

vs.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT B.F. GOODRICH COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY S. SUTTON
(Counsel Of Record)
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

JAMES A. RYDZEL
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

THEODORE E. LASZLO, JR.
THE B.F. GOODRICH COMPANY
4020 Kinross Lakes Parkway
Richfield, Ohio 44286
(330) 659-7717

Counsel for Respondent
THE B.F. GOODRICH COMPANY

QUESTIONS PRESENTED

1. Whether The B.F. Goodrich Company's decision to make ministerial changes to its welfare benefits plans in accordance with a decision to transfer its tire division to a newly-created company (*e.g.*, transfer responsibility for the retirement welfare benefits of certain corporate employees to the new company) constitutes a fiduciary act within the meaning of ERISA and, if so, whether B.F. Goodrich breached any fiduciary duty in transferring responsibility for these benefits.

2. Whether a triable issue of fact exists over the allegation that B.F. Goodrich promised to provide lifetime welfare benefits to its retirees.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, the B.F. Goodrich Company advises the Court that B.F. Goodrich does not have a parent company and has the following nonwholly owned subsidiaries:

DTM Corporation
DTM GmbH
BFGoodrich - Messier, Inc.
Messier-BFGoodrich S.A.
Telenor S.A.
Port Systems, L.L.C.
Goodrich Holding Corporation
Taysung Enterprises Co., Ltd.
Rohr, Inc.
Rohr Aero Services - Asia Pte. Ltd.
BFGoodrich China, Inc.
Youli Piping Co. Ltd.
Transportation Insurance Limited
Tortuga Casualty Co.
United Insurance Co.
Freedom Chemical Diamalt Beteiligungs GmbH
Chongqing Diamalt Biochemical Co. Ltd.
BFGoodrich Diamalt GmbH
HackerMalt Proteine Verwaltungs GmbH
HackerMalt Proteine GmbH & Co.
Lyomark Pharma GmbH
Srinivasa Cystine Limited
Indiamalt Pvt. Ltd.
Yantal Prince Chemical Co. Ltd.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 1

REASONS FOR DENYING THE PETITION 5

I. The Sixth Circuit's Fiduciary-Duty Decision Applies Settled Law To The Unique Facts Of This Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Court 5

A. The Sixth Circuit's Decision Is Correct 5

B. There Is No Lower-Court Conflict Of Authority 7

C. The Sixth Circuit Alternatively Concluded That No Fiduciary Duty Was Breached 9

II. The Sixth Circuit's Contract-Based ERISA Decision Applies Settled Law To The Unique Facts Of This Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Court 11

A. The Sixth Circuit Did Not Create An "Almost Irrebuttable Presumption" Against Vesting 11

B. Plaintiffs Have Waived Any Challenge To The Sixth Circuit's Clear-Promise Requirement, Which In Any Event Does Not Conflict With Other Courts. 12

C. Because The Sixth Circuit And District Court Alternatively Concluded That BFG Unambiguously Chose Not To Promise Lifetime Welfare Benefits, The Petition Does Not Squarely Raise The Question Presented 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3d Cir. 1992) 14
Barker v. Ceridian Corp., 122 F.3d 628 (8th Cir. 1997) .. 14
Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984) 12
Cantor v. Berkshire Life Insurance Co., 171 N.E.2d 518 (Ohio 1960) 15
Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 128 A. 280 (Md. 1925) 10
Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 6, 10
Diehl v. Twin Disc, Inc., 102 F.3d 301 (7th Cir. 1996) 12
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 15
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 10
Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995) 14
Howe v. Varity, 36 F.3d 746 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996) 7
Hughes Aircraft Co. v. Jacobson, No. 97-1287, 1999 WL 24546 (U.S. Jan. 25, 1999) 6
International Association of Machinists & Aerospace Workers v. Masonite Corp., 122 F.3d 228 (5th Cir. 1997) 12, 13
Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) 14

Keffer v. H.K. Porter Co., 872 F.2d 60 (4th Cir 1989) 13
Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 6
Luli v. Sun Products Corp., 398 N.E.2d 553 (Ohio 1979) 15
Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir.), *cert. denied*, 118 S.Ct. 2312 (1998) 11, 12
Stewart v. KHD Deutz of America Corp., 980 F.2d 698 11th Cir. 1993) 12, 13
Systems Council EM-3, International Brotherhood of Electriccl Workers, AFL-CIO v. AT&T Corp., 159 F.3d 1376 (1998) 8
In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896 (3d Cir. 1995) 14
United Paperworkers International Union v. Champion International Corp., 908 F.2d 1252 5th Cir. 1990) 12, 13
United States v. Johnston, 268 U.S. 220 (1925) 17
United Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987) 12, 13
Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir. 1993), *cert. denied*, 510 U.S 820 (1993) 12, 14

STATUTES AND RULES

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, *et seq.* 1
29 U.S.C. § 1002(7) 15
29 U.S.C. § 1002(21)(A) 6
29 U.S.C. § 1104(a)(1) 5
Sup. Ct. R. 10 9

STATEMENT

Three retired employees of The B.F. Goodrich Company ("BFG") claim that their employer violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, *et seq.*, (1) by transferring responsibility for their welfare benefits to a newly-created joint venture, now owned by Michelin, that was spun off from BFG, and (2) by breaking alleged promises not to reduce their welfare benefits. A unanimous panel of the Sixth Circuit (Suhrheinrich, Daughtrey, *McKeague*) rejected plaintiffs' claims in their entirety, as did the district court (Dowd) before it.

The Sixth Circuit determined that under the facts and circumstances of this case BFG's 1986 decision to divest its tire division, along with its decision to transfer responsibility for welfare benefits of designated employees to the newly-created entity, did not constitute a "fiduciary" act within the meaning of ERISA. The panel next concluded that even if the divestiture did constitute a fiduciary act, BFG did not breach any fiduciary duty in implementing the decision. The panel finally concluded that there was insufficient evidence to show that the company ever promised plaintiffs vested and unchangeable welfare benefits. Each of these factbound decisions, resting on settled legal principles previously accepted by this Court, does not warrant further review.

1. Plan Documents.

Prior to the passage of ERISA, BFG had several benefits program. In 1972, it distributed brochures to employees describing the programs it offered for major medical insurance, hospitalization and surgical, pension, life insurance, and prescription drugs. None of the plans promised lifetime benefits, and the major medical plan expressly reserved BFG's right to modify or discontinue the benefits provided.

In 1977, in the aftermath of the enactment of ERISA, BFG prepared the company's first summary plan descriptions. It distributed the descriptions to all employees along with an opening brochure, entitled "Highlights," which summarized the hospitalization, major medical, life insurance and other benefits programs. Neither the Highlights booklet nor any of the individual summary plan descriptions promised vested or unchangeable welfare benefits. And the Highlights booklet explicitly contained the following reservation of rights: "While the Company expects to continue these benefits indefinitely, it reserves the right at its option to change or discontinue any or all of the programs at any time." Pet. App. 4a.

In 1981, BFG distributed revised summary plan descriptions and a Highlights booklet to its employees. Again, none of the offerings promised lifetime welfare benefits, and the Highlights booklet specifically included the prior reservation-of-rights clause.

In 1986, BFG sent a new summary plan description for the Retiree Health Care Plan to all retirees. It contained the following reservation: "The BFGoodrich Company expects to continue the Health Care Plan indefinitely but reserves the right to amend, suspend or terminate the Plan at any time." Pet. App. 4a-5a.

That same year, BFG and Uniroyal Tire Company decided jointly to divest their tire operations to create a new company called Uniroyal Goodrich Tire Company ("UGTC"). As part of the plan, BFG and Uniroyal agreed to own UGTC in equal parts and to transfer all assets and liabilities of their tire divisions to the new company. Among the transferred liabilities were the pension and welfare-benefit obligations of BFG to its tire-related retirees. Besides transferring liability for the pension and welfare benefits of retirees who worked solely in the tire division, BFG also transferred the benefits liabilities for a proportionate percentage of its corporate staff

retirees. Before the divestiture, BFG's corporate staff serviced its tire, chemical, rubber, aerospace and plastics operations, and performed other operations that benefitted the company as a whole.

Finding that it "was impossible to determine which [corporate] retirees had worked most closely with the tire division throughout the course of their careers," Pet. App. 5a, BFG had to develop a method for assigning certain corporate retirees to the new company. It ultimately selected a random percentage of corporate retirees, equivalent to the relative percentage of BFG's tire-related business, and transferred their benefit liabilities to the newly-created entity. Ultimately, BFG transferred about 42% of its corporate retirees and their welfare benefits to the new entity, and did so by randomly dividing employees based on their social security numbers. The joint-venture agreement required UGTC to "assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business." Pet. App. 6a.

2. BFG Modifies Its Welfare Benefits.

In 1990, BFG modified the welfare benefits of its retirees by increasing their medical plan deductibles and copayment maximums. These cost increases did not apply to retirees from the tire division that had been spun off to create UGTC, or to the BFG corporate employees who had been assigned to the UGTC welfare benefit plans. None of the retired employees of BFG, still covered by its welfare benefits plans, filed a lawsuit or administrative complaint challenging the modification.

3. UGTC Modifies Its Welfare Benefits.

In 1995, UGTC modified its retiree welfare benefits as well. Much like BFG five years earlier, the company increased its

medical plan deductibles and copayment maximums. In addition, it altered the life insurance, prescription drug, and Medicare reimbursement benefits. *See* Pet. App. 7a n.3. The modifications applied to the transferred retirees from BFG's tire division and to the transferred corporate employees that by then had become the responsibility of UGTC.

4. Plaintiffs' Claims.

Plaintiffs are three BFG retirees who formerly held salaried positions in the company. Glen H. Sengpiel retired in 1976 from his position as Corporate Director of Employee Relations. Donald R. Gottschalk retired in 1981 from his position as Corporate Employee Relations Representative. And Donald E. Kelly retired in 1982 from his position as Foreman in plant cleaning for tire operations.

On February 13, 1996, plaintiffs brought suit against BFG, UGTC, UGTC's successor, Michelin North America, and the benefits plans of BFG and UGTC. They made two claims pertinent here: (1) that BFG's transfer of its benefits obligations to UGTC breached its fiduciary duties under ERISA, and (2) that the transfer breached a promise to pay vested and unchangeable retirement benefits.

5. The Decisions Below.

The district court rejected both claims, granting summary judgment to the defendants. It concluded that BFG did not act in a fiduciary capacity when it transferred the welfare plan liabilities to UGTC and therefore that ERISA's fiduciary requirements did not apply. The court further concluded that the lifetime-benefits claims failed because plaintiffs' welfare benefits did not vest at any particular level at the time of their retirement.

The Sixth Circuit affirmed in each respect. It found that BFG's decisions to divest the tire division, to transfer responsibility for the welfare benefits of the tire division

retirees to UGTC and to include a representative percentage of corporate employees in the transfer did not constitute fiduciary acts under ERISA. The latter transfer, the court concluded, amounted to the "ministerial application of a percentage classification to implement its business decision" to divest the tire division and was "simply not the kind of plan management or administration that trigger[s] ERISA's fiduciary duties." Pet. App. 11a. In the alternative, the court found that even if the transfer decisions constituted fiduciary acts, the record evidence all established that they were done in good faith. The court likewise found that on the record of this case, plaintiffs could not establish a cognizable contract-based claim. Concluding that "the plan documents in this case do not express a clear and affirmative intent to vest employees' welfare benefits," Pet. App. 14a, the court rejected the claim as a matter of law.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Fiduciary-Duty Decision Applies Settled Law To The Unique Facts Of This Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Court.

The Sixth Circuit's fiduciary-duty decision represents a factbound interpretation of settled law. Because the court's interpretation of "fiduciary acts" carefully follows precedent from this Court, because it does not meaningfully conflict with any other lower court decisions, and because in any event the court alternatively concluded that no fiduciary duty was breached, the decision does not warrant review.

A. The Sixth Circuit's Decision Is Correct.

To begin with, the court of appeals' analysis is accurate and adheres to precedent from this Court. Section 404 of ERISA identifies certain limited fiduciary duties that govern the management of welfare benefit plans. 29 U.S.C. § 1104(a)(1)

(a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and their beneficiaries"). These fiduciary obligations attach, however, only to employers' activities that involve "the exercise of discretionary authority or control over plan management or administration." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (quotation omitted); *see* 29 U.S.C. § 1002(21)(A). While such duties therefore apply to the administration or management of welfare benefits, they do not apply to decisions relating to benefit plan "design" such as the formation, amendment or termination of plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78-80 (1995) (a company does not act as a fiduciary in amending or terminating a welfare plan). *See id.* at 78 ("Employers or other plan sponsors are generally free under ERISA for any reason at any time, to adopt, modify, or terminate welfare plans."). *See also Spink*, 517 U.S. at 891 ("the act of amending a pension plan does not trigger ERISA's fiduciary provisions"); *Hughes Aircraft Co. v. Jacobson*, No. 97-1287, 1999 WL 24546 (U.S. Jan. 25, 1999) (same).

The Sixth Circuit carefully adhered to this framework. BFG's transfer of its retirees' welfare benefits, it concluded, more closely resembles a decision to modify, amend or terminate a plan than it does to administering one. Plaintiffs, notably, go a long way to conceding the point. They "agree" that "Goodrich's decision to divest its tire division is a business decision not subject to ERISA's fiduciary standards." Pet. 16. For the same reason that such decisions do not rise to the level of a "discretionary" fiduciary act, neither do the necessary ministerial acts that follow from such decisions, including the need to identify the employees whose welfare benefits will be the responsibility of the new company. ERISA simply was never designed to regulate such decisions, particularly when the challenged acts spring from the

implementation of a concededly legitimate business transaction.

B. There Is No Lower-Court Conflict Of Authority.

Unable to counter the accuracy of the Sixth Circuit's and district court's uniform conclusions on this score, plaintiffs resort to arguing (Pet. 14-16) that the decisions create a shallow conflict of lower-court authority. Their effort is manufactured and in the end wrong. The single citation on which they rely, *Howe v. Varity*, 36 F.3d 746, 756 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996), simply does not live up to its billing.

Far from establishing a lower-court conflict, *Howe*'s one-paragraph analysis identifies the outer boundaries of the legal framework within which the Sixth Circuit worked. The case involved a corporation's blatant "scheme . . . to rid" itself of the "obligations to pay benefits to retirees" by creating an "essentially bankrupt" company to handle these and other obligations and to take over a declining combine and tractor line. 36 F.3d at 750 (quoting district court's findings of fact). At the time of the transfer of retiree obligations, the company knew that the new subsidiary had more debts than assets and had no chance of success. *Id.* at 749-50. The retired employees were not told of the transfer at the time it occurred, and only learned of it two years later when the newly-created entity went into receivership and they stopped receiving welfare benefits. *Id.* at 755-56.

BFG's actions have no tenable parallel to the circumstances of *Howe*. Unlike the factual findings of the Eighth Circuit, the Sixth Circuit concluded that "[t]here is nothing in the record to suggest that BFG was motivated by bad faith or self-dealing considerations." Pet. App.12a. In contrast to the *Howe* subsidiary, the BFG joint venture created a financially sound company, one that was healthy when formed in 1986 and one that has remained so ever since, including in its new capacity

as part of the well-established French tire manufacturer, Michelin. In contrast to *Howe*'s conclusion that the company had "contractually created duties" to the employees, the Sixth Circuit found that no such contractual duties existed. Pet. App. 15a ("plaintiffs' benefits were never vested"). And while the *Howe* retirees' welfare benefits were abruptly terminated when the new entity went into receivership, plaintiffs here continue to receive the same welfare and pension benefits they had at the time of transfer: vested pension benefits and changeable, non-vested welfare benefits.

In the final analysis, *Howe* does not establish a pertinent conflict with the Sixth Circuit's decision. It merely confirms that while business decisions to divest a part of a company generally do not constitute fiduciary acts, such decisions may implicate fiduciary duties when carried out in a particularly egregious manner or when done in bad faith. Notably, plaintiffs have not identified any other courts of appeals decisions or a single decision from this Court that supports their interpretation of *Howe*'s inscrutable, single-paragraph analysis. Indeed, since *Howe* and since the decision below, the D.C. Circuit has followed the Sixth Circuit's fiduciary duty analysis in a setting almost identical to this one. *See Systems Council EM-3, Int'l Brotherhood of Electrical Workers, AFL-CIO v. AT&T Corp.*, 159 F.3d 1376, 1379-80 (1998) (concluding that AT&T did not act in a fiduciary capacity when it transferred its equipment business to Lucent and transferred responsibility for its welfare benefits plans to Lucent). On this record, *Howe* ultimately represents the exception that proves the rule, and certainly fails to create the kind of lower-court conflict that deserves this Court's attention.

C. The Sixth Circuit Alternatively Concluded That No Fiduciary Duty Was Breached.

But even if the petition implicated a square conflict, which it does not, it represents an exceedingly poor vehicle for addressing this issue. The Sixth Circuit also concluded that even if a fiduciary duty existed, none was breached. Pet. App. 12a-13a. Plaintiffs accordingly cannot obtain relief save through a factbound inquiry, in the context of a complex and lengthy record, into allegations that BFG breached a fiduciary duty.

This question plainly falls short of meeting the customary requirements for granting the writ, most notably Rule 10's double-barreled admonition that a petition is "rarely granted" when the alleged error consists of (1) "erroneous factual findings" or (2) "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Plaintiffs' contention ultimately comes to nothing more than that. At most plaintiffs ask the Court to draw different factual inferences from the circumstances leading to BFG's divestiture of the tire division than the lower courts did or to apply ERISA's fiduciary duty requirements in a manner different from the lower courts.

What is more, the factual inferences that plaintiffs ask the Court to draw are not the right ones and indeed have utterly no support in the record. Plaintiffs baldly allege (Pet. 19) that the transfer of the corporate group retirees was "an integral part of Goodrich's attempt to shift its liability to its successor in interest." No such conspiracy existed, however. In point of fact, the transferred employees initially benefitted from the change because in 1990 BFG increased the deductibles for medical insurance and copayment maximums for its retirees, a development that did not cover retirees assigned to UGTC. Not until 1995, nine years after the spin-off transaction, did UGTC even increase some of these costs and therefore in any way burden plaintiffs. Not one shred of evidence indicates that

UGTC (now Michelin) will ultimately be a less secure provider of retiree welfare benefits than BFG was. Still less does the evidence show that BFG would have been a *more* secure provider of retiree welfare benefits if, as plaintiffs now request, it had been saddled with responsibility for all retirees of the tire division, corporate or otherwise, after the spin-off of the division.

Nor have plaintiffs shown a more feasible way to carry out BFG's business decision with respect to its corporate employees. They do not challenge BFG's position that there was no reasonable way to determine the corporate employees who had worked primarily with the tire division in view of the seamless allocations of responsibility among them. All they do is tepidly suggest (Pet. 20) that "[a] fair method would have been to transfer 42.54% of all Corporate Group retirees' obligations to UGTC and for Goodrich to retain 57.46% of the group's obligations." But this hopelessly confusing approach could not possibly be in plaintiffs' or BFG's interest. It would lead to dual sets of benefits procedures that no retiree, medical insurance provider or doctor could ever decipher. Neither the text of ERISA nor the cases decided under it support such an awkward approach, to say nothing of compel it.

Plaintiffs also have not identified any case support for their position (Pet. 19) that every business transaction, no matter how complex, must be undertaken "solely for the benefit" of plan participants. *Howe* does not support such a wide-ranging approach, but instead simply illustrates that a bad-faith transaction may require the consent of retirees. The other cited cases (Pet. 20-21) are also inapposite, as they merely assume that the employer — unlike BFG — had made a promise to provide life-time unchangeable benefits. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Crane Ice Cream Co. v. Terminal Freezing & Heating Co.*, 128 A. 280 (Md. 1925). Were plaintiffs correct, moreover, no

corporation could commence a deal that, while clearly beneficial to the company and its public shareholders, might result in a slight detriment to unvested benefits. Nor could corporations ever reduce or terminate unvested benefits, decisions that self-evidently are not "solely for the benefit" of plan participants.

The Sixth Circuit's fiduciary-duty analysis is correct, factbound and does not conflict with any decisions of this Court or the lower courts. Nor does the decision implicate a recurring federal issue of national importance. The peti-tion, in this respect, should be denied.

II. The Sixth Circuit's Contract-Based ERISA Decision Applies Settled Law To The Unique Facts Of This Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Court.

For many of the same reasons that the first question presented does not warrant further review, neither does the second one — whether BFG made lifetime and unchangeable promises to its retirees to provide welfare benefits. Plaintiffs again attempt to find disarray in the circuits over the question when there is consistency and error when there is accuracy. They also overlook the fact that their primary legal argument has been waived and was not even essential to the decision below. Just last Term, moreover, the Court rejected an attempt to seek review of a similar decision by the Sixth Circuit. *See Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, 118 S.Ct. 2312 (1998).

A. The Sixth Circuit Did Not Create An "Almost Irrebuttable Presumption" Against Vesting.

Plaintiffs initially argue (Pet. 22) that the Sixth Circuit created an "almost irrebuttable presumption against 'vesting.'" But this strawman falsely characterizes what the court said as well as what it did. "Because vested benefits are forever

unalterable, and because employers are not legally required to vest them," the court sensibly concluded (like many courts before it) that such promises "'must be stated in clear and express language.'" Pet. App. 13a (quoting *Sprague v. General Motors Corp.*, 133 F.3d at 400 and *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993), *cert. denied*, 510 U.S. 820 (1993)). A requirement that such long-term promises be stated "clear[ly]" simply does not create an "almost irrebuttable presumption" against them.

B. Plaintiffs Have Waived Any Challenge To The Sixth Circuit's Clear-Promise Requirement, Which In Any Event Does Not Conflict With Other Courts.

The same proclivity for overstatement undermines plaintiffs' second contention, namely (Pet. 22-25) that the Sixth Circuit's clear-promise requirement is wrong and conflicts with decisions from other circuits. Plaintiffs' disagreement with the standard has been waived. Even though the district court relied on a clear-promise requirement in rejecting plaintiffs' claims, Pet. App. 47a-48a, plaintiffs nowhere challenged that standard in their opening or reply briefs to the Sixth Circuit. On this record, they cannot do so now.

At any rate, the alleged conflict of authority does not pan out. Most of the decisions on which they rely arise in the distinct context of collective-bargaining agreements, and do not even help them at that. *See International Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228, 231, 233 (5th Cir. 1997); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984). Claims of this sort arise

under the Labor-Management Relations Act, and the lower-court decisions — including, most prominently, plaintiffs' own cases — hold that such claims are governed by special rules applicable to labor agreements. As one of plaintiffs' featured cases pointedly acknowledges, different interpretive rules apply in this setting. "[C]ollective bargaining agreements," the Fourth Circuit has held, "are not interpreted under traditional rules of contract but under a federal common law of labor policy." *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir 1989). Most of the other collective-bargaining cases on which plaintiffs rely make the same point. *See Masonite Corp.*, 122 F.3d at 231, 233 ("the rules of contractual interpretation are still applied with flexibility . . . in the context of labor contracts"; a reservation-of-rights clause that would control outside of a collective-bargaining situation "cannot vitiate contractually vested or bargained-for rights") (quotation omitted); *Stewart*, 980 F.2d at 702 ("[f]ederal substantive law governs the interpretation and enforcement of contracts covered by section 301(a) of the LMRA"; "the parol evidence rule should not be rigidly applied to labor contracts"); *Champion Int'l Corp.*, 908 F.2d at 1256 ("provisions of a labor contract may be more readily expanded by implication than those of contracts memorializing other transactions").

Still other flaws plague plaintiffs' reliance on these cases. Because the First Circuit's decision in *Textron*, for example, arose in a preliminary-injunction setting, the court saw no need to "weigh" "conflicting arguments" over the actual clarity of the employer's promises, but only to find that the requirements for preliminary relief had been met. 836 F.2d at 9. The Fourth Circuit in *Keffer* found that the pertinent "language" of the collective bargaining agreement in fact met a clear-promise requirement. The agreement, it concluded, made it "clear that all of the parties concerned fully anticipated that the Retirees' benefits would continue beyond the expiration of their collective bargaining agreement." 872 F.2d at 63. At any rate,

the suggestion that the Fourth and Sixth Circuits are at odds over this standard is thoroughly put to rest by the Fourth Circuit's recent conclusion that a "right to a fixed level of lifetime" medical benefits "must be stated in clear and express language." *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (quotation omitted) *cert. denied*, 514 U.S. 1057 (1995). The same defect hinders reliance on the Fifth Circuit's decision in *United Paperworkers*, since that circuit, too, has agreed that such promises "must be stated in clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d at 937.

The non-collective-bargaining cases on which plaintiffs rely contain fatal deficiencies as well. Contrary to plaintiffs' suggestion (Pet. 24-25), *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), does not establish that the Third Circuit disagrees with the Sixth Circuit over whether ambiguous plans may give rise to vested rights. More recently, the Third Circuit (in an opinion written by the same judge who authored *Alexander*) explained that vested rights "must be found in the plan documents and stated in clear and express language." *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995). And the Eighth Circuit's decisions in *Barker v. Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997), and *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S.1050 (1995), are also unhelpful. In *Barker*, the employer's reservation of rights was itself ambiguous, and actually suggested that plaintiffs' benefits were vested. 122 F.3d at 635-36. That holding does not conflict with the outcome in this case, where the "Highlights" booklet clearly reserved BFG's rights to modify or terminate welfare benefits. *Jensen*, in turn, reaffirms the point, concluding that "a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits." 38 F.3d at 950.

Plaintiffs also make a passing reference (Pet. 25) to two cases decided by the Ohio Supreme Court. *Luli v. Sun Products Corp.*, 398 N.E.2d 553 (Ohio 1979); *Cantor v. Berkshire Life Ins. Co.*, 171 N.E.2d 518 (Ohio 1960). Both cases, however, were decided under Ohio law, did not concern ERISA, did not address the merits of a clear-promise requirement, and at any rate concerned pension, not welfare, benefits.

Still less have plaintiffs identified any tension between the Sixth Circuit's analysis and the decisions of this Court. The only Supreme Court case they discuss (Pet. 25) in any detail — *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) — is factually and legally inapposite. It does not address the clear-promise argument made here, and instead construes only the meaning of plan "participant" under 29 U.S.C. § 1002(7) and the appropriate standard of review for an action challenging the denial of severance benefits after a workforce reduction.

The alleged conflict of authority in the end does not withstand scrutiny. The cited cases either are inapposite or are not inconsistent with the Sixth Circuit's analysis, or in some instances both. Most critically, plaintiffs have yet to identify a single circuit court decision, state supreme court decision, or decision from this Court in which they would prevail on these facts.

C. Because The Sixth Circuit And District Court Alternatively Concluded That BFG Unambiguously Chose Not To Promise Lifetime Welfare Benefits, The Petition Does Not Squarely Raise The Question Presented.

Even aside from the absence of disagreement on the issues presented and even aside from plaintiffs' failure to allege, let alone show, that the issue raised is of national importance, the petition should be denied for still another reason. The case

presents a poor vehicle for looking at the question whether ambiguous promises may vest lifetime welfare benefits. The rule plaintiffs propose, it turns out, would not even have made an impact on the outcome of this case. The district court ultimately concluded that "the plan documents are not ambiguous" as to whether BFG intended to vest welfare benefits. Pet. App. 14a n.7. And in finding for itself that "the plan documents are not ambiguous," the Sixth Circuit ultimately reached the same conclusion, even without considering the explicit reservation of rights contained in the "Highlights" booklet. *Id.* The Sixth Circuit also specifically countered the two pieces of language from the summary plan descriptions on which plaintiffs rely, aptly recognizing that they were descriptive, not promissory. The court found that the one phrase in the 1977 Hospitalization Plan — "if you retire and are eligible for a pension you shall continue to have the same health coverage" — "neither expressly guarantees lifetime benefits nor creates an ambiguity as to whether such benefits are vested." Pet. App. 14a. And it found that the other provision at most contained an implication, but did not create an ambiguity, again without even considering the effect of the repeated and unambiguous reservation of rights included in the "Highlights" booklets. *Id.* Neither conclusion is particularly remarkable, particularly in light of plaintiffs' prior statement through counsel to the district court that the claimants "do not challenge the abstract legal right of [BFG] to amend or terminate retiree welfare benefit plans." Pet. App. 51a.

Under these circumstances, the question whether ambiguous documents may give rise to vested rights is not presented here, and thus the Court would have no occasion to address the rules governing the construction of allegedly ambiguous plans. Ultimately, plaintiffs' core disagreement with the Sixth Circuit goes not to a dispute over legal principles but to a dispute over the correct interpretation of the unique facts presented by a

voluminous record. But that dispute, as Rule 10 makes clear, only "rarely" warrants the Court's attention. This unexceptional decision, we respectfully submit, simply is not one of those cases. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel Of Record
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
Columbus, Ohio 43215
Telephone (614) 469-3855

JAMES A. RYDZEL
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

THEODORE E. LASZLO, JR.
THE B.F. GOODRICH COMPANY
4020 Kinross Lakes Parkway
Richfield, Ohio 44286
(330) 659-7717

Counsel for Respondent
THE B.F. GOODRICH COMPANY

February 1999